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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1931

STATE OF WISCONSIN,
Petitioner,

v.

NATIONAL LIBERTY LIFE INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

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PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Wisconsin Supreme Court entered in this proceeding on February 25, 1974.

OPINION BELOW

The opinion of the Wisconsin Supreme Court is reported as *National Liberty Life Insurance Company v. State* (1974), 62 Wis. 2d 347, 215 N.W. 2d 26, and a copy of it is printed in the Appendix hereto. The opinion of the Circuit Court of Dane County, Wisconsin, dated October 3, 1972, is unreported.

JURISDICTION

The judgment of the Wisconsin Supreme Court was entered on February 25, 1974. A timely motion for rehearing was made and filed by the petitioner, hereinafter referred to as the State. On June 4, 1974, the Wisconsin Supreme Court denied without opinion the motion for rehearing. A copy of this denial of rehearing is printed in the Appendix hereto. The jurisdiction of this Court is now, within 90 days of the denial of the motion for rehearing, invoked under 28 U.S.C. 1257 (3).

QUESTION PRESENTED

Is sec. 201.42 (11), 1969 Wis. Stats., imposing on unauthorized foreign insurers a tax measured by premiums received by them for insuring subjects resident or located in Wisconsin, less premiums properly allocated or apportioned and reported as taxable premiums of any other state or states, unconstitutional as violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution because such tax is not further "apportioned" to tax only the in-state activities of the foreign insurer which contribute to the gross premiums on which the tax is levied?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Article XIV of Amendments:

"Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Statutes, 1969

Section 201.42:

"(11) UNAUTHORIZED INSURANCE PREMIUM TAX. (a) Except as to premiums on lawfully procured surplus lines insurance and premiums on independently procured insurance on which a tax has been paid pursuant to sub. (12), *every unauthorized insurer shall pay* to the commissioner before March 1 next succeeding the calendar year in which the insurance was so effectuated, continued or renewed *a premium receipts tax of 3 per cent of gross premiums charged for such insurance* other than marine insurance and a premium receipts tax of one-half of one per cent of gross premiums charged for such marine insurance *on subjects resident, located or to be performed in this state.* Such insurance on subjects resident, located or to be performed in this state procured through negotiations or an application, in whole or in part occurring or made within or from within or outside of this state, or for which premiums in whole or in part are remitted directly or indirectly from within or outside of this state, shall be deemed to be insurance procured, or continued or renewed in this state. The term 'premium' includes all premiums, membership fees, assessments, dues and any other consideration for insurance. Such tax shall be in lieu of all taxes and fire department dues. On default of any such unauthorized insurer in the payment of such tax the insured shall pay the tax. If the tax prescribed by this subsection is not paid within the time stated, the tax shall be increased by a penalty of 25 per cent and by the amount of an additional penalty computed at the rate of one per cent per month or any part thereof from the date such payment was due to the date paid.

"(b) If a policy covers risks or exposures only partially in this state, the tax payable shall be computed on the portions of the premium which are properly allocable to the risks or exposures located in this state. In determining the amount of premiums taxable in this state, all premiums written, procured, or received in this state

and all premiums on policies negotiated in this state shall be deemed written on property or risks located or resident in this state, *except such premiums as are properly allocated or apportioned and reported as taxable premiums of any other state or states.*" (Emphasis added.)

STATEMENT OF THE CASE

During the years 1963 through 1969, the respondent, National Liberty Life Insurance Company, hereinafter called National, a Pennsylvania corporation, was engaged in the business of selling health and accident insurance and life insurance. Although it was not licensed to do business in Wisconsin and was an unauthorized insurer, it, during this period, sold insurance to Wisconsin residents on which the premiums charged were $1,432,479.00.

National had no office, officer, agent, agency, or other representative in Wisconsin for the purpose of interviewing prospects, solicitation of insurance, investigating risks, adjusting claims, or otherwise servicing policies or policyholders in Wisconsin. It did not own or maintain any bank account or other personal property or real property within Wisconsin.

Insurance policies sold to residents of Wisconsin by National were solicited through advertisements inserted in newspapers and magazines published in or circulated in Wisconsin and by the delivery in Wisconsin of letters, brochures, and pamphlets sent through the United States mail. Insurance policies were issued by National at its principal place of business in Pennsylvania on the basis of application forms completed by Wisconsin residents and mailed by them to Pennsylvania. Insurance policies were delivered to the insureds in Wisconsin by mail from Pennsylvania and were

effective only when the premiums therefor were received in Pennsylvania after having been mailed to National by the Wisconsin residents.

Contacts between National and its Wisconsin resident policyholders were carried out by National from its office in Pennsylvania through use of the mail and interstate telephone and telegraph services.

The Wisconsin Commissioner of Insurance, pursuant to sec. 201.42 (11), 1969 Wis. Stats., which is on the subject of "Unauthorized Insurance Premium Tax," assessed premium taxes and penalties against National in the sum of $60,532.83 for the years 1963 through 1969. On April 1, 1970, National paid this sum under protest and subsequently, on September 29, 1970, commenced an action in the Circuit Court of Dane County, Wisconsin, to recover the sum paid together with interest from April 1, 1970, and for its costs and disbursements.

The complaint of National alleged the above facts and asserted, among other things, that the imposition on it of the premium taxes and penalties deprived it of its property without due process of the law. The State demurred to the complaint on the ground that it failed to state facts therein sufficient to constitute a cause of action.

On October 3, 1972, the Circuit Court of Dane County, the Honorable William C. Sachtjen, circuit judge presiding, issued a memorandum decision in which, after concluding that National's allegations had already been tested by another mail-order insurer and rejected by the courts in *Ministers Life & Casualty Union v. Haase* (1966), 30 Wis. 2d 339, 141 N.W. 2d 287, app. dis. 385 U.S. 205, 87 S.Ct. 407, 17 L.Ed. 2d 301, sustained the State's demurrer. On October 6, 1972, a judgment dismissing the complaint was signed and filed.

National appealed from the judgment to the Wisconsin Supreme Court. On appeal, it raised two questions, which were described by the Wisconsin Supreme Court as:

> "1. Does the application of sec. 201.42 (11) (a), Stats. 1969, to National constitute the taking of property without due process of law contrary to the guarantees of the Fourteenth amendment to the United States Constitution?
>
> "2. If the State of Wisconsin can constitutionally apply a general revenue tax to the appellant, is sec. 201.42 (11) (a), Stats. 1969, nonetheless unconstitutional for failure to apportion the tax on the basis of that activity conducted in the State of Wisconsin as opposed to that activity conducted outside the State of Wisconsin which combine to produce the gross receipts upon which the tax is levied?" (App. 3.)

The Wisconsin Supreme Court, after a review of the decisions of this and other courts, properly answered question 1, *supra*, in the negative. Although question 2 had not been decided by the lower court, it reversed the judgment of that court after answering question 2 in the affirmative. It is from this latter holding that the State now petitions this Court to issue a writ of certiorari to the Wisconsin Supreme Court.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Wisconsin Supreme Court Is Contrary To The Applicable Decisions Of This Court.

A. This Court has uniformly held that state statutes imposing a tax on foreign insurers, which tax is measured by the premiums received from insuring subjects resident in the state, do not violate the Due Process Clause of the Fourteenth Amendment.

This petition does not seek review of the question of whether the State has power to impose a tax on National. On this subject, the Wisconsin Supreme Court properly concluded that it did and that the imposition of a tax is not a violation of the Due Process Clause. The sole question here involved is whether the constitutionally imposed tax can, consistent with due process, be measured by the premiums received by National from insuring subjects resident in Wisconsin, less premiums properly apportioned and reported by National as taxable premiums in any other state or states.

The Wisconsin Supreme Court erroneously answered this latter question. It was aware of the controlling decisions of this Court, but erroneously concluded that they merely upheld the constitutionality of imposition of the tax and did not uphold the constitutionality of the tax being measured by the premiums received from insuring state residents. It, then, applied certain inapplicable decisions of this Court and came to the conclusion that the tax was unconstitutional because it was "not apportioned" on the basis of that activity conducted in the State of Wisconsin as opposed to that activity conducted outside the State, which activities combine to produce the premiums on which the tax is levied.

In so concluding the Wisconsin Supreme Court not only misread the controlling decisions of this Court, but also overlooked its own correct decision in *Lutheran Mutual Life Ins. Co. v. State* (1943), 242 Wis. 598, 608, 9 N.W. 2d 82, in which it recognized that this Court had held constitutional a gross premium tax on a foreign insurer measured by the premiums received by it from insuring subjects resident in the taxing state. In *Lutheran Mutual,* 242 Wis. at 608, the Wisconsin Supreme Court wrote:

> "* * * There is no taking of property without due process. The constitutionality of basing the license fee upon business done within the state, and *measuring the tax upon the premiums on policies of residents of the state*

> * * * was sustained by the United States supreme court in *Equitable Life Assur. Society v. Pennsylvania,* 238 U.S. 143, 35 Sup. Ct. 829, 59 L.Ed. 1239. * * *" (Emphasis added.)

In *Equitable Life Assur. Society v. Pennsylvania* (1915), 238 U.S. 143, 35 S.Ct. 829, 59 L.Ed. 1239, this Court unanimously held that it was not a taking of property without due process of the law for a state to impose on a foreign insurer a tax measured by the premiums received by the insurer on policies issued to state residents. In upholding the constitutionality of a Pennsylvania 2 percent gross premium tax on foreign insurers, this Court wrote (238 U.S. at 147):

> "* * * It is not unnatural to take the [premiums from] policy holders residing in the State as a measure without going into nicer if not impracticable details. Taxation has to be determined by general principles, and it seems to us impossible to say that the rule adopted in Pennsylvania goes beyond what the Constitution allows."

Subsequently this Court has also approved this measurement of the tax imposed on foreign insurers. In *Lincoln National Life Insurance Company v. Read* (1945), 325 U.S. 673, 677, 65 S.Ct. 1220, 89 L.Ed. 1861, which primarily was an equal protection case, this Court pointed out:

> "* * * Moreover, it has never been held that a State may not exact from a foreign corporation as a condition to admission to do business the payment of a tax *measured by the business done within its borders.* See Continental Assur. Co. v. Tennessee, 311 US 5, 85 L ed 5, 61 S Ct 1. That was the nature of the tax imposed in Fire Asso. of Phila. v. New York, supra. * * *" (Emphasis added.)

Again, in *Prudential Insurance Company v. Benjamin* (1946), 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342, this Court held that a 3 percent South Carolina tax on premiums received by a foreign insurer and measured by "business done in

South Carolina, without reference to its interstate or local character" did not violate due process (328 U.S. at 437, 438), as well as the Commerce Clause and a miscellany of other federal constitutional provisions.

This Court, therefore, and contrary to the decision of the Wisconsin Supreme Court herein, has consistently held that state statutes imposing gross premium taxes on foreign insurers measured by a percentage of the premiums received for insuring subjects resident in the taxing state do not violate due process.

B. The decision herein erroneously misapplies and perhaps even misconstrues certain decisions of this Court based on the Commerce Clause, which is not applicable to state taxes on foreign insurers

Article I, section 8, of the United States Constitution grants to Congress the power "To regulate commerce * * * among the several states * * *." When Congress exercises such power it is for the purposes of achieving uniformity in state regulation and taxation of businesses engaged in interstate commerce, to avoid discriminatory burdens on those businesses and to prevent multiple taxation of them by the various states.

The business of entering into insurance transactions has always been considered as unique.[1] Until 1944 insurance transactions were not considered to be "commerce" and, therefore, the Commerce Clause had no applicability to the

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1. For example see the discussion in *Paul v. Virginia* (1868), 75 U.S. 168 at 183, 19 L.Ed. 357.

interstate insurance business. Insurance was considered to be a local transaction of great local public interest and the states regulated and taxed insurance companies. This Court in *United States v. South-Eastern Underwriters Association* (1944), 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440, however, held that insurance transactions which cross state lines are interstate commerce.

This holding appeared to threaten state regulation and taxation of insurance. In reaction to it, Congress passed the McCarran Act, which reads, in part, at 15 U.S.C.:

"§1011. Declaration of policy

"Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

"§1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

"(a) The business of insurance, and every person engaged therein shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* * * *."

The effect of the McCarran Act was declared by this Court in *Prudential Insurance Company v. Benjamin* (1946), 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342. That case involved a

state statute, which, as here, imposed a 3 percent gross premium tax on foreign insurers measured by the premiums received by the insurer for "business done in South Carolina, without reference to its interstate or local character." This Court wrote (328 U.S. at 431):

> "* * * it [Congress by passage of the McCarran Act] *clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause* to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for.
>
> "Two conclusions, corollary in character and important for this case, must be drawn from Congress' action and the circumstances in which it was taken. One is that Congress intended to declare, and in effect declared, that uniformity of regulation, and of state taxation, are not required in reference to the business of insurance, by the national public interest, except in the specific respects otherwise expressly provided for. *This necessarily was a determination by Congress that state taxes, which in its silence might be held invalid as discriminatory, do not place on interstate insurance business a burden which it is unable generally to bear* or should not bear in the competition with local business. Such taxes were not uncommon among the states, and *the statute clearly included South Carolina's tax now in issue.*" (Emphasis added.)

The Commerce Clause and the cases interpreting it are, therefore, inapplicable to and impose no constitutional barrier against state taxation of foreign insurers measured by the premiums received from insuring subjects resident in the taxing state. "South Carolina's tax now in issue" is measured in the same way as is the Wisconsin tax imposed by sec. 201.42 (11), 1969 Wis. Stats. Both are constitutional.

Actually, however, the holdings of this Court in the here inapplicable Commerce Clause cases relied on by the Wisconsin Supreme Court do not even support its declaration that the Wisconsin statute in question is unconstitutional because it is unapportioned to tax only "that activity conducted in the State of Wisconsin as opposed to that activity conducted outside the State of Wisconsin which combine to produce the gross receipts upon which the tax is levied." (App. 3.)[2] At least the Washington Court of Appeals does not similarly interpret those and other cases of this Court. It, in *Standard Pressed Steel Co. v. Department of Revenue* (1973), 10 Wash. App. 45, 516 P. 2d 1043, upheld the constitutionality of a state gross receipts tax measured by the wholesale sales in Washington of a corporation engaged in interstate commerce and, unlike foreign insurers, covered by the Commerce Clause. It wrote, 516 P. 2d at 1047,

> "The fact that the value which the gross receipts measure is, in large part, the result of activity *outside* the territorial limits of the taxing jurisdiction does not mean the gross receipts are not fairly related to the

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2. The Wisconsin Supreme Court mentioned *Greyhound Lines v. Mealey* (1948), 334 U.S. 653, 68 S.Ct. 1260, 92 L.Ed. 1633 (a state gross receipts tax on transportation between points within the State of New York when 43 percent of the mileage is outside the state is a violation of the Commerce Clause, but the state may constitutionally impose a tax on gross receipts apportioned by mileage within the state); *Northwestern Cement Co. v. Minnesota* (1959), 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed. 2d 421 (the Commerce Clause and the Due Process Clause were not violated by a state statute levying nondiscriminatory net income taxes on that portion of a foreign corporation's net income earned from and fairly apportioned to business activities within the taxing state, even though those activities are exclusively in furtherance of interstate commerce); *General Motors v. Washington* (1964), 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed. 2d 430 (an unapportioned gross receipts tax is not a violation of the Commerce Clause when the in-state and out-of-state activities producing the receipts (wholesale sales) are a "maze of local connections"; *General Motors v. District of Columbia* (1965), 380 U.S. 553, 85 S.Ct. 1156, 14 L.Ed. 2d 68 (a regulation imposing a 5 percent tax on income based on sales within the district compared to all sales is not in conformity with the statute under which it was adopted).

> activity *within* the jurisdiction. There is no constitutional objection to resorting to extraterritorial elements in determining the *measure* of a tax. General Motors Corp. v. State, 60 Wash. 2d 862, 874, 376 P. 2d 843 (1962), aff'd, in General Motors Corp. v. Washington, *supra;* Wisconsin v. J.C. Penney Co., *supra* [311 U.S. 435] at 445 [61 S.Ct. 246, 85 L.Ed. 267], rehearing denied, 312 U.S. 712, 61 S Ct. 444, 85 L.Ed. 1143 (1941); Great Atl. & Pac. Tea Co. v. Grosjean, 301 U.S. 412, 425, 57 S.Ct. 772, 81 L.Ed. 1193, 112 A.L.R. 293 (1937)."

and subsequently, at page 1048, concluded:

> "For the foregoing reasons, we find no constitutional infirmities derived from either the due process or commerce clauses to preclude the state from levying a tax upon the local activities of Standard Pressed Steel Company. Further, it was constitutionally permissible to measure that tax by the value of gross receipts from sales to the Boeing Company's facilities in this state. We therefore sustain the imposition of the business and occupation tax in this case."[3]

On the basis of these inapplicable and perhaps misconstrued Commerce Clause cases, a conclusion that the in-state and out-of-state activities of National are sufficiently

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3. On June 17, 1974, this Court noted probable jurisdiction in *Standard, supra.* The present case could be a very helpful companion or follow-up case in which this Court could restate or change its prior decisions on state taxation of the interstate insurance business, which is not restricted by the Commerce Clause, but is within the purview of the Due Process Clause. If the United States Constitution now requires that state taxes on the gross receipts or income of interstate businesses received from within the taxing state be apportioned to levy the tax only on in-state activity contributing to those receipts or income, is this required by the Commerce Clause, the Due Process Clause, or both? As indicated *post,* section C hereof, other decisions of this Court indicate that if such apportionment is required it is required solely because of the Commerce Clause and not because of the Due Process Clause.

separable to require "apportionment" (App. 20)[4] and in disregard of the controlling decisions of this Court holding that state taxes on foreign insurers may constitutionally be measured by the premiums received from insuring subjects resident in the taxing state, the Wisconsin Supreme Court erroneously held that sec. 201.42 (11), 1969 Wis. Stats., violated the Due Process Clause. The Due Process Clause, however, has never been interpreted by this Court to apply to or limit lawfully imposed state taxes.

C. This decision is contrary to the uniform holdings of this Court that the Due Process Clause does not apply to or limit lawfully imposed state taxes.

The decision of the Wisconsin Supreme Court herein is that sec. 201.42 (11), 1969 Wis. Stats., constitutionally imposes a tax on National (App. 17) but that it, in violation of the Due Process Clause, unconstitutionally measures that tax, since the result of the statutory method of measurement is that National is also taxed on out-of-state activities which contribute to the production of the Wisconsin gross premiums on

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4. To avoid the holding in *General Motors v. Washington* (1964), 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed. 430, which held constitutional an unapportioned state gross receipts tax on an interstate business covered by the Commerce Clause when there is a "maze of local connections," the Wisconsin Supreme Court made the above conclusion. This conclusion, however, finds little support in this record, which consists primarily of a complaint, a demurrer and a decision of the lower court, which did not even consider the apportionment issue raised on appeal. If the Commerce Clause cases are applicable at all, this is clearly a situation where "underlying questions of fact may condition the unconstitutionality of legislation" and if so "the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute." *O'Gorman & Young v. Hartford Fire Insurance Co.* (1931), 282 U.S. 251, 257-258, 51 S.Ct. 130, 75 L.Ed. 324, 72 A.L.R. 1163. There is no such factual foundation in this record.

which the tax is levied. This basically is a holding that the tax on National is excessive because it taxes the result of out-of-state as well as in-state activities and, therefore, is in violation of the Due Process Clause.

The trouble with this holding is that it is one which has uniformly been rejected by this Court. This Court has always held that the Due Process Clause is not a limitation on a lawfully imposed state or local tax, even though that tax may be excessive. The most recent decision to this effect was made by this Court on June 10, 1974, in *City of Pittsburgh v. Alco Parking Corporation* (1974), — U.S. —, 94 S.Ct. 2291, 41 L.Ed. 2d 132.

In that case, the City of Pittsburgh imposed a 20 percent gross receipts tax on operators of private parking facilities. The Pennsylvania Supreme Court held that this ordinance violated the Due Process Clause of the Fourteenth Amendment. This Court unanimously reversed that judgment and in so doing wrote (94 S.Ct. 2294, 2295):

> "In Magnano Co. v. Hamilton, 292 U.S. 40, 54 S.Ct. 599, 78 L.Ed. 1109 (1934), the Court sustained against due process attack a state excise tax of 15¢ per pound on all butter substitutes sold in the State. Conceding that the 'tax is so *excessive* that it may or will result in destroying the intrastate business of appellant,' the Court held that *'the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress,' that no different rule should be applied to the States, and that a tax within the lawful power of a State should not 'be judicially stricken down under the due process clause* simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses.' *Id.*, at 44-45, 54 S.Ct., at 601. The premise that a tax is invalid

if so excessive as to bring about the destruction of a particular business, the Court said, had been 'uniformly rejected as furnishing no juridical ground for striking down a taxing act.' *Id.* at 47, 54 S.Ct. at 602. Veazie Bank v. Fenno, 8 Wall. 533, 548, 19 L.Ed. 482 (1869); McCray v. United States, 195 U.S. 27, 24 S.Ct. 769, 49 L.Ed. 78 (1904); and Alaska Fish Salting & By-Products Co. v. Smith, 255 U.S. 44,41 S.Ct. 219, 65 L.Ed. 489 (1921), are to the same effect.

"* * *

"Neither the parties nor the Pennsylvania Supreme Court purport to differ with the foregoing principles. But the state court concluded that this was one of those 'rare and special instances' recognized in *Magnano* and other cases where the *Due Process Clause may be invoked because the taxing statute is 'so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power,* but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property.' 292 U.S., at 44, 54 S.Ct., at 601." (Emphasis added.)

The present tax is clearly a revenue measure constituting an "exertion of the taxing power" and, therefore, falls within the general principles that the Due Process Clause is not a limitation upon the taxing power of a state and that a tax, such as the present one which the Wisconsin Supreme Court herein found to be within the lawful power of state, should not be "judicially stricken down under the due process clause" simply because it may constitute excessive taxation of National.

"Due process" is nothing more than fundamental fairness. Fairness is not perfection, as has been pointed out many times by this Court.[5] The tax statute here involved, which measures

5. For example, "A defendant is entitled to a fair trial not a perfect one." *Lutwak v. United States* (1953), 344 U.S. 604, 619, 73 S.Ct. 481, 97 L.Ed. 593, and *Bruton v. United States* (1968), 391 U.S. 123, 135, 88 S.Ct. 1620, 20 L.Ed. 2d 476.

the tax by only those premiums received by National from insuring subjects resident or located in Wisconsin and which allows subtraction of any premiums from them which are properly apportioned and reported by National as taxable premiums in any other state or states, has always been and is a "fair" measurement of the tax and is actually already an apportioned tax aimed at taxing only the Wisconsin activities of National. As stated by Justice Holmes in *Equitable Life Assur. Society v. Pennsylvania* (1915), 238 U.S. 143, 147, 35 S.Ct. 829, 59 L.Ed. 1239, it is probably "impracticable" to go into "nicer" "details" in measuring this tax, but even if practicable "it seems impossible to say" that such measurement violates due process. It *is* impossible to so say on the basis of the decisions of this Court, which are contrary to the judgment and opinion of the Wisconsin Supreme Court herein.

II. This Decision Is Of Great Import And Consequence And Requires Action By This Court.

The State of Wisconsin annually collects approximately $22,000,000.00 from foreign insurers.[6] All of this much needed revenue is collected from unauthorized and authorized foreign insurers on the basis of gross premium taxes measured by the premiums received by the foreign insurer for insuring subjects resident or located in this state. Unless this Court reviews the decision herein and corrects its erroneous holding, the State of Wisconsin will annually lose all tax revenue from unauthorized foreign insurers and is in jeopardy of losing all of this revenue until such time as the Wisconsin Legislature

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6. The 1973 *Wisconsin Insurance Report* published by the State of Wisconsin Commissioner of Insurance reveals, page 9, that in the fiscal year 1971-1972 Wisconsin collected $21,664,418.18 in premium taxes from foreign insurers. At the present time the sum is undoubtedly greater.

can *create* and enact a more detailed, although probably no fairer, method of measuring such tax.[7]

Not only Wisconsin, but practically all of the states tax foreign insurers solely or primarily on the basis of gross premium taxes measured by the premiums received for insuring subjects resident or located in the state.[8] If the decision of the Wisconsin Supreme Court is correct and is followed by other state supreme courts or affirmed by this Court, all of these statutes are also unconstitutional.

If this happens, new state legislation would be required, and in the interim the financial consequences would be very, very great and perhaps even disabling to the already financially beleaguered state governments.[9] The result would be a huge windfall to insurance companies which have grown and

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7. Northwestern Mutual Life Insurance Company, the National Association of Life Underwriters, and the Wisconsin Association of Life Underwriters filed amicus curiae briefs in the Wisconsin Supreme Court in support of the State's motion for rehearing. These briefs pointed out that sec. 201.42 (11), 1969 Wis. Stats., does provide a "fair" apportionment and that such tax is an apportioned tax reasonably attributable to in-state activities of a foreign insurer. They, further, indicate that if further apportionment is required by the Due Process Clause the traditional apportionment formula applied when interstate businesses manufacturing and selling tangible products are involved is of little or no value in devising a formula to cover the unique insurance business and its unique "product," which is a continuing promise to pay but only if and when a covered loss occurs.

8. See such publications as that entitled "Fees and Taxes Charged Insurance Companies Under the Laws of New York Together With Abstracts of the Fees, Taxes and Other Requirements of Other States" published in 1973 by the New York Department of Insurance. See also 2 Couch, *Insurance* (2d Ed.), §21:116, and 19 Appleman, *Insurance Law and Practice*, §10587.

9. Wisconsin is, in many ways, an average state. A rough estimate of the national annual loss to the states if gross premium taxes on foreign insurers are unconstitutional can be made by multiplying $22,000,000.00 by 50, which is $1,100,000,000.00.

prospered under state regulation and taxation.[10] The required change in the laws of the states, the interim loss of revenue to the states and the resultant windfall to insurance companies should not occur unless and until THIS COURT overrules its prior applicable decisions and declares that the long established almost universally followed and constitutional method of measuring or apportioning state taxes on foreign insurers is no longer acceptable and constitutes a taking of property without due process of law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and decision of the Wisconsin Supreme Court.

Respectfully submitted,

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August 30, 1974

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10. Insurance companies control a substantial portion of this nation's wealth. Some very out-of-date (1944) but amazing figures on *one* insurance company are found in footnote 15 at page 416 of *Prudential Insurance Company v. Benjamin* (1946), 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342.

APPENDIX

No. 246
August Term, 1973
STATE OF WISCONSIN: IN SUPREME COURT

National Liberty Life Ins. Co.,
a Pennsylvania corp.,
Appellant,
v.
State of Wisconsin,
Respondent.

FILED
FEB 25 1974
ROBERT O. UEHLING
CLERK OF SUPREME COURT
MADISON, WISCONSIN

APPEAL from a judgment of the circuit court for Dane county: WILLIAM C. SACHTJEN, Circuit Judge. *Reversed.*

This case presents an attack on the attempt by the respondent, State of Wisconsin (hereinafter State), to impose a gross premiums tax with penalties on the National Liberty Life Insurance Company (hereinafter National), an unlicensed foreign "mail order" insurance company. National was assessed the sum of $60,532.83 in premium taxes and penalties for the years 1963 through 1969, pursuant to sec. 201.42 (11) (a), Stats. 1969.[1] On April 1, 1970, National paid the

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[1] "Sec. 201.42 Unauthorized insurance. . . .
"(11) UNAUTHORIZED INSURANCE PREMIUM TAX. (a) Except as to premiums on lawfully procured surplus lines insurance and premiums on independently procured insurance on which a tax has been paid pursuant to sub. (12), every unauthorized insurer shall pay to the commissioner before March 1 next succeeding the calendar year in which the insurance was so effectuated, continued or renewed a premium receipts tax of 3 per cent of gross premiums charged for such insurance other than marine insurance and a premium receipts tax of one-half of one per cent of gross premiums charged for such marine insurance on subjects resident, located or to be performed in this state. Such insurance on subjects resident, located or to be performed in this state procured through negotiations or an application, in whole or in part occurring or made within or from within or outside of this state, or for which premiums in whole or in part are remitted directly or indirectly from within or outside of this state, shall be deemed to be insurance procured, or continued or renewed in this state. The term 'premium' includes all premiums,

assessment under protest to prevent additional penalties and in order to become licensed by the respondent State of Wisconsin. National applied for licensing on April 29, 1968, and its application is still pending. On September 29, 1970, National commenced this action under sec. 76.37 (2), Stats. 1969,[2] in the circuit court for Dane county to recover the taxes paid, and the State demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. National moved for judgment on the pleadings and the trial court issued a memorandum decision sustaining the State's demurrer.

In its complaint National claimed that the taxes imposed upon it pursuant to sec. 201.42 (11) (a), Stats. 1969, imposed an unreasonable burden upon interstate commerce and deprived National of its property without due process of law and denied to National the equal protection of the laws. It was also claimed that the taxes were arbitrary, unreasonable and discriminatory.

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membership fees, assessments, dues and any other consideration for insurance. Such tax shall be in lieu of all taxes and fire department dues. On default of any such unauthorized insurer in the payment of such tax the insured shall pay the tax. If the tax prescribed by this subsection is not paid within the time stated, the tax shall be increased by a penalty of 25 per cent and by the amount of an additional penalty computed at the rate of one per cent per month or any part thereof from the date such payment was due to the date paid."

[2] "Sec. 76.37 License; issuance; collection of fees. . . .

"(2) No suit shall be brought to restrain or enjoin the collection of any license fee or tax imposed or provided for by ss. 76.30 to 76.37, and the fees required by s. 601.31. Any company, corporation or association, aggrieved by the payment of any such license or other fee or tax, may maintain a suit against the state for the recovery thereof in the circuit court for Dane county within 6 months from the time of the payment thereof. The state may be served in such suit as provided in s. 262.06 (3)." This section has been repealed and replaced by sec. 618.43, Stats.

In its memorandum opinion, the trial court reviewed the various contentions of the parties and concluded that "[i]t seems clear to this court that the State of Wisconsin has the power to tax the plaintiff and is not violating the Due Process Clause of the United States Constitution."

From the judgment dismissing National's complaint, National appeals.

Further facts are set forth in the opinion.

WILKIE, J. Two controlling issues are presented on this appeal:

1. Does the application of sec. 201.42 (11) (a), Stats. 1969, to National constitute the taking of property without due process of law contrary to the guarantees of the Fourteenth amendment to the United States Constitution?

2. If the State of Wisconsin can constitutionally apply a general revenue tax to the appellant, is sec. 201.42 (11) (a), Stats. 1969, nonetheless unconstitutional for failure to apportion the tax on the basis of that activity conducted in the State of Wisconsin as opposed to that activity conducted outside the State of Wisconsin which combine to produce the gross receipts upon which the tax is levied?

Due Process Objections.

National is not contesting the constitutionality of sec. 201.42, Stats. 1969, but it is contesting the constitutionality of the application of sub. (11) (a) to itself. National recognizes that this court upheld the constitutionality of the regulatory and taxation aspects of sec. 201.42 in *Ministers Life & Casualty Union v. Haase*[3], but points out that the court recognized that the constitutionality of the application of the statute will vary with the fact situation:

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[3] (1966), 30 Wis. 2d 339, 141 N.W. 2d 287.

". . . We do not hold, however, that any one single act defined as doing business in the state in sec. 201.42, Stats., is alone sufficient for the application of the section to a given business. Each set of facts must be considered on its own merits when applying the statute."[4]

National asserts that there must be some "physical presence" of a corporation within the taxing state, such as an office, retail outlet, agents, representatives or quasi agents, to give a state constitutional jurisdiction to impose a tax. National finds that the presence of "group leaders" in *Ministers* satisfied the requirement of "physical presence" within the taxing state, but that in this case there is absolutely no physical presence sufficient to support the imposition of a general revenue tax.

National asserts that the "minimum contacts" necessary to support due process jurisdiction for service of process, police power regulation, and general revenue taxation differ and that a more stringent test is necessary to validate a power to tax a foreign corporation. National feels that a series of cases culminating in *National Bellas Hess v. Department of Revenue*[5] indicate that in order for the constitutional imposition of a tax on a "mail order" business there must be some physical presence of the corporation within the taxing state. National also contends that this test or standard applies, without exception, to all mail order businesses including the sale of insurance.

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[4] *Id.* at page 361.

[5] (1967), 386 U.S. 753, 87 Sup. Ct. 1389, 18 L. Ed.2d 505.

The position of National is well phrased in a recent legal periodical:[6]

"Accordingly, presence through an agent or a place of business is a prerequisite to the imposition of a general revenue measure. And it makes no difference, in this connection, what the nature of the business is. In this respect taxation differs from regulation. Contacts that would justify *regulatory* provisions as to one type of business might not as to another because of the greater interest of the state in the former than in the latter. Thus, a state can properly regulate an insurance business based upon contacts which would not support regulation of a greeting card business, for example. But when it comes to general revenue taxation the question is whether the taxpayer is present so that the state is called upon to provide anything for which it may constitutionally require a tax contribution. Here the nature of the business becomes unimportant."

In support of its contention that taxation requires greater state contacts to justify it, National cites *Freeman v. Hewit.*[7] In that case the United States Supreme Court said:

". . . A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests. . . . State taxation falling on interstate commerce, on the other hand, can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys. But revenue serves as well no matter what its source. To deny to a state a particular source of income because it taxes the very process of interstate commerce does not impose a crippling limitation on a State's ability to carry on its local function. Moreover,

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[6] William A. Patty, *State Premium Taxes on Mail Order Insurance Under the Due Process Clause*, 22 Tax Lawyer (1969), 363, 369, 370.

[7] (1946), 329 U.S. 249, 253, 254, 67 Sup. Ct. 274, 91 L. Ed. 265.

the burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations. The power to tax is a dominant power over commerce. Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce. The task of scrutinizing is a task of drawing lines. This is the historic duty of the Court so long as Congress does not undertake to make specific arrangements between the National Government and the States in regard to revenues from interstate commerce."

The analysis in this quotation is clearly based on the restrictions of the Commerce Clause. One recurring problem in analyzing Supreme Court decisions on the permissibility of taxation and regulation of foreign corporations is the failure of the Supreme Court to clearly distinguish between restrictions on state power based on the Commerce Clause and those based on the Due Process Clause of the Fourteenth amendment. In the case of the insurance business, *Prudential Ins. Co. v. Benjamin*[8] establishes that the McCarran Act has removed any objections to state regulation or taxation of insurance based on the Commerce Clause. Therefore, any restrictions on the power of the states over the insurance business must rest on the vague requirements of the Due Process Clause. The McCarran Act appears to be the type of specific congressional act referred to by the Supreme Court in the *Freeman Case* and makes the language of that case inapplicable to the present situation.

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[8] (1946), 328 U.S. 408, 66 Sup. Ct. 1142, 90 L. Ed. 1342.

Another case relied on heavily by National is *Norton Co. v. Department of Revenue.*[9] In *Norton* the United States Supreme Court held that a gross receipts tax on all sales to persons in Illinois made by a Massachusetts corporation with its factory and head office in Massachusetts, but with a branch office in Illinois, was partially unconstitutional. The Supreme Court validated a tax on those sales which were processed by the local office, but held the tax could not be applied to those sales attributable to direct mail orders to the company at its Massachusetts headquarters and delivery to the Illinois customers through the channels of interstate commerce. This was despite the probability that some form of advertising must have solicited the requests for merchandise. The Supreme Court stated in that case:

"Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable."[10]

And finally the case on which National principally relies is *National Bellas Hess v. Department of Revenue.*[11] In that case the appellant was a mail order house with its principal place of business in Missouri. It had no tangible property in Illinois, no sales outlets, representatives, telephone listing or solicitors in that state and did not advertise by radio, television or newspapers. It obtained Illinois customers

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[9] (1951), 340 U.S. 534, 71 Sup. Ct. 377, 95 L. Ed. 517.

[10] *Id.* at page 537.

[11] *Supra*, footnote 5.

through catalogues and "flyers" it mailed to residents of Illinois. The orders were sent to its plant in Missouri and delivered to customers by mail or common carrier. By this method National Bellas Hess was able to do a several million dollar business in Illinois and had a mailing list with over 5,000,000 names. However, the United States Supreme Court held that it was a violation of the Commerce Clause and perhaps the Due Process Clause to impose a duty of use tax collection and payment upon such a seller whose only connection with customers in the state was by common carrier or by mail.

National Bellas Hess claimed that such an imposition violated the Due Process Clause of the Fourteenth amendment and created an unconstitutional burden on interstate commerce. The Supreme Court said:

". . . These two claims are closely related. For the test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this area are similar. See *Central R. Co. v. Pennsylvania,* 370 U.S. 607, 621-622 (concurring opinion of MR. JUSTICE BLACK). As to the former, the Court has held that 'State taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys.' *Freeman v. Hewit,* 329 U.S. 249, 253. See also *Greyhound Lines v. Mealey,* 334 U.S. 653, 663; *Northwestern Cement Co. v. Minnesota,* 358 U.S. 450, 462. And in determining whether a state tax falls within the confines of the Due Process Clause, the Court has said that the 'simple but controlling question is whether the state has given anything for which it can ask return.' *Wisconsin v. J. C. Penney Co.,* 311 U. S. 435, 444.

See also *Standard Oil Co. v. Peck*, 342 U. S. 382; *Ott v. Mississippi Barge Line*, 336 U. S. 169, 174. The same principles have been held applicable in determining the power of a State to impose the burdens of collecting use taxes upon interstate sales. Here, too, the Constitution requires 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' *Miller Bros Co. v. Maryland*, 347 U. S. 340, 344-345; *Scripto, Inc. v. Carson*, 362 U.S. 207, 210-211. See also *American Oil Co. v. Neill*, 380 U. S. 451, 458."[12]

The Supreme Court noted that National Bellas Hess was liable for the tax whether it was collected from the customers or not and so the standards applied would seem to govern both the power to regulate and the power to tax. The Supreme Court then reviewed earlier cases on the validity of use taxes and concluded that:

"In order to uphold the power of Illinois to impose use tax burdens on National in this case, we would have to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business. But this basic distinction, which until now has been generally recognized by the state taxing authorities, is a valid one, and we decline to obliterate it."[13]

The majority opinion based its decision very heavily if not entirely on the burdens such use tax collection requirements would have for mail order sellers like National Bellas Hess

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[12] *Id.* at pages 756, 757.

[13] *Id.* at page 758.

if every state with which the company did business imposed a similar duty but with different rates and different administrative requirements.

The dissenters in *National Bellas Hess* (Justices Fortas, Douglas and Black) felt that a realistic approach required a different result. They felt:

"There should be no doubt that this large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market is a sufficient 'nexus' to require Bellas Hess to collect from Illinois customers and to remit the use tax, especially when coupled with the use of the credit resources of residents of Illinois, dependent as that mechanism is upon the State's banking and credit institutions. Bellas Hess is not simply using the facilities of interstate commerce to serve customers in Illinois. It is regularly and continuously engaged in 'exploitation of the consumer market' of Illinois (*Miller Bros Co. v. Maryland*, 347 U. S. 340, 347 (1954) by soliciting residents of Illinois who live and work there and have homes and banking connections there, and who, absent the solicitation of Bellas Hess, might buy locally and pay the sales tax to support their State. . . ."[14]

However, the majority did not feel these "contacts" were sufficient connection with the state to allow this requirement and clearly chose a "physical presence" standard over a vaguer standard based on the degree of exploitation of the consumer market of the state.

The real issue here is whether this line of cases is controlling in the field of insurance. It is not. The *National Bellas Hess Case* is a very unclear mingling of due process and commerce clause standards. It is not clear whether the "physical presence" test is now a due process and commerce

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[14] *Id.* at pages 761, 762.

clause test or a mixture of both or purely a commerce clause test. In any event, it is clear that the burden which the particular tax placed on interstate commerce strongly influenced the court to strike it down. The premium tax involved in the present case on review does not place a comparable burden on interstate commerce (insurance is interstate commerce).[15] It does not require the same type of administrative burdens involved in keeping track of a tax on each individual sale from a catalogue with over 4,000 individual items. An insurance company ordinarily would have the information of how many policyholders it had in an individual state and what the premium revenue was from that state. A straight percentage figure of that total is all that is required.

The Wisconsin premium tax is also not an isolated general revenue measure. Although it raises general revenue it is part of a complex regulatory scheme covering both licensed and unlicensed, domestic and foreign insurance companies doing business in Wisconsin. The premium tax is designed both to encourage unauthorized insurers to become licensed and to prevent a competitive disadvantage to those licensed insurers who do pay a premium tax as well as other taxes. Why should an unauthorized insurer have the benefit of a regulated market without paying anything at all? In *Osborn v. Ozlin*[16] the Supreme Court highlighted the legitimacy of state interest in the effects on the totality of its regulatory system.

Shepard's Citations does not reveal a subsequent Supreme Court case in which *National Bellas Hess* has been mentioned.

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[15] *United States v. Underwriters Asso.* (1944), 322 U.S. 533, 64 Sup. Ct. 1162, 88 L. Ed. 1440.

[16] (1940), 310 U. S. 53, 60 Sup. Ct. 758, 84 L. Ed. 1074.

Those state cases which have construed it have applied *National Bellas Hess* to other situations of use tax collection regulations against retail mail order sellers of tangible property.[17]

In *Ministers Life & Casualty Union v. Haase*[18] we indicated that cases on other types of business are irrelevant to the determination of due process issues in the field of insurance.

". . . The application of the contact concept of jurisdiction to regulate or tax cannot be measured by a mathematical or quantitative rule. Other cases are helpful but generally not controlling or are dispositive, and in such class falls the cases cited by Ministers. Likewise, we refrain from citing cases sustaining regulation or taxing statutes of other types of businesses."

Ministers reviewed and discussed the development of cases in the insurance field and concluded that state interest in the field of insurance is an important factor in determining whether the state can assert jurisdiction to regulate and tax consistent with due process. This court said:

". . . It is true, public interest alone is not sufficient to give a state jurisdiction, but great concern and public interest do add significance to contacts which compose the organic whole and are directly related to the regulation and which

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[17] For example, *Club v. Porterfield* (1971), 25 Ohio St. 2d 277, 268 N. E. 2d 272 (invalid as against mail order book seller).

[18] *Supra*, footnote 3, at page 360.

might not otherwise be sufficient to meet the standard of the due-process clause."[19]

In *McGee v. International Life Ins. Co.*[20] the United States Supreme Court upheld a California court's jurisdiction over a foreign insurer who had no office or agent in California, who never solicited in California, nor did any business in California except with respect to the sole policy involved in the case. The Supreme Court said: "It cannot be denied that California has a *manifest interest* in providing effective means of redress for its residents when their insurers refuse to pay claims." (Emphasis supplied.)[21] In *Hanson v. Denckla*[22] the trend toward expanding state court jurisdiction over nonresidents was halted when the Supreme Court refused to uphold a Florida court's jurisdiction over a Delaware trust company which was trustee of a trust deed whose creator moved to Florida and executed a will and named beneficiaries of the trust. The Florida court sought to determine the validity of the power of appointment. The Supreme Court distinguished the *McGee Case* by saying that in *McGee:*

"... the State had enacted special legislation (Unauthorized Insurers Process Act) to exercise what *McGee* called its 'manifest interest' in providing effective redress for citizens who had been injured by nonresidents engaged in an activity that the State treats as exceptional and subjects to special regulation."[23]

In *Hoopeston Co. v. Cullen*[24], two insurance companies challenged the jurisdiction of New York to apply its insurance law to them. The Supreme Court again emphasized the importance of state interest.

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[19] *Id.*, at page 357.

[20] (1957), 355 U.S. 220, 78 Sup. Ct. 199, 2 L. Ed.2d 223.

[21] *Id.* at page 223.

[22] (1958), 357 U.S. 235, 78 Sup. Ct. 1228, 2 L. Ed.2d 283.

[23] *Id.*, at page 252.

[24] (1943), 318 U.S. 313, 63 Sup. Ct. 602, 87 L. Ed. 777.

"[T]he issue remains whether the insurance enterprise as a whole so affects New York interests as to give New York the power it claims.

"In determining the power of a state to apply its own regulatory laws to insurance business activities, the question in earlier cases became involved by conceptualistic discussion of theories of the place of contracting or of performance. More recently it has been recognized that a state may have substantial interests in the business of insurance of its people or property regardless of these isolated factors. This interest may be measured by highly realistic considerations such as the protection of the citizen insured or the protection of the state from the incidents of loss."[25]

In concluding, the United States Supreme Court established three considerations for testing "whether insurance business is done within a state" for the purpose of determining a state's power to regulate: (1) "the location of activity prior and subsequent to the making of the contract," (2) "the degree of interest of the regulating state in the object insured," and (3) "the location of the property insured." The Supreme Court said these factors are "separately and collectively of great weight."[26] The case leaves open the question of to what extent contacts are essential in sustaining a state's power to regulate and tax.

The trial court was correct here in concluding that *Ministers* did not turn on the presence of "group leaders." This was only one of many "contacts" enumerated by this court although this was considered a significant contact. The hallmark case of *International Shoe Co. v. Washington*[27]

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[25] *Id.* at pages 316.

[26] *Id.* at page 319.

[27] (1945), 326 U.S. 310, 316, 66 Sup. Ct. 154, 90 L. Ed. 95.

states the rule that the taxing state has jurisdiction if the insurance company has "certain minimum contacts with it such that [payment of the *tax*] does not offend 'traditional notions of fair play and substantial justice.'"

The traditional due process standard for upholding taxation is whether "the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."[28] Does the unauthorized insurer, National Liberty Life Insurance Company, receive the requisite benefits in the present case? The answer is "Yes." Anything which tends to lessen the danger of accidents, threats to life, and unhealthy conditions redounds to the benefit of companies engaged in either the life insurance or accident and health insurance business.[29] Wisconsin provisions for public health, safety and welfare paid for out of general revenues are benefits enjoyed by National for which it would be fair to expect a contribution. The United States Supreme Court found in *Equitable Life Society v. Pennsylvania*[30] that the protection afforded to policyholders by the taxing state is a factor to be considered in evaluating the issue of whether a particular method of taxation meets due process standards. National asserts in its brief that such benefits are too indirect and are of the nature of the benefits or "contacts" which the Supreme Court did not find significant in *National Bellas Hess*. However, the benefits from an ordered society are much more directly

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[28] *Wisconsin v. J. C. Penney Co.* (1940), 311 U.S. 435, 444, 61 Sup. Ct. 246, 85 L. Ed. 267.

[29] Hanson and Obenberger, *Mail Order Insurers: A Case Study in the Ability of the States to Regulate the Insurance Business*, 50 Marq. L. Rev. (1966) 175.

[30] (1915), 238 U.S. 143, 35 Sup. Ct. 829, 59 L. Ed. 1239.

related to National's business than to the retail sales involved in the *National Bellas Hess* case.

The presence or absence of an agent in the state is not the sole constitutionally determinative question. In this case there are sufficient other contacts to provide the nexus for the constitutional imposition of the gross premiums tax. National, in its complaint, tends to minimize its contacts with Wisconsin. It alleges that it did almost no prepolicy investigation or investigation of claims in Wisconsin. It even alleges that it does not underwrite its accident and health policies.

In a recent case,[31] California sought to enjoin further sales efforts by a mail order insurer until it obtained a certificate of authority from the state. The company had no agents in California and the sole contacts with policyholders were by mail. The California Supreme Court rejected the contention that the right to regulate turned on presence or absence of "agents" within the state. It said that "realistically viewed the insurer through the instrumentality of the mail is for all practical purposes soliciting insurance here as manifestly as if it were to carry on such solicitation through representatives physically present within this state."[32] Thus California felt that its interest in the regulation of insurance coupled with solicitation efforts and the presence of the insureds was sufficient to sustain the injunctive powers sought by the state in enforcing its insurance code. The appeal in this case as well as in *Ministers* was dismissed by the Supreme Court.[33]

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[31] *People v. United National Life Ins. Co.* (1967), 66 Cal. 2d 577, 58 Cal. Rptr. 599, 427 Pac.2d 199.

[32] *Id.* at page 593.

[33] *United National Life Ins. Co. v. California* (1967), 389 U.S. 330, 88 Sup. Ct. 506, 19 L. Ed.2d 562; *Ministers Life & Casualty Union v. Haase* (1966), 385 U.S. 205, 87 Sup. Ct. 407, 17 L. Ed.2d 301.

This is considered a decision on the merits although in practical terms it may be of no greater precedential value than a denial of certiorari. But it would indicate a broad attitude toward state regulation and taxation of insurance.

Although the facts in the present complaint do not really give any indication of the extent of the solicitation of business done by the appellant in Wisconsin, Exhibit A attached to the complaint shows that gross premiums rose from $23,114 in 1963 to $215,000 in 1969 for a total over the years in question of $1,432,479. This indicates a substantial business and establishes a sufficient contact with this state to justify the imposition of a tax on the appellant's business in Wisconsin especially in view of the fact that the premium tax in question is part of a much larger regulatory program aimed at unauthorized insurers and enacted to protect Wisconsin citizens in an area of recognized state concern.

Apportionment of the Tax.

National contends that even if the state of Wisconsin can impose a tax on National without violating the due process clause; the present form of the taxing statute is still unconstitutional because it is a gross premium tax which is not fairly apportioned to the activities which National conducts in Wisconsin.

In the area of apportionment of taxes the cases again tend to mix the restrictions of the commerce clause and due process clause. The earlier cases on the subject base their decisions almost exclusively on the commerce clause — that a state cannot tax purely interstate commerce. In *Greyhound Lines v. Mealey*[34] the Supreme Court held that New York

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[34] (1948), 334 U.S. 653, 661, 663, 68 Sup. Ct. 1260, 92 L. Ed. 1633.

could constitutionally tax gross receipts from a common carrier of passengers if the receipts were apportioned as to the mileage within the state. The court said:

". . . In a case like this nothing is gained, and clarity is lost, by not starting with recognition of the fact that it is interstate commerce which the State is seeking to reach and candidly facing the real question whether what the State is exacting is a constitutionally fair demand by the State for that aspect of the interstate commerce to which the State bears a special relation. . . .

". . . By its very nature an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys.' "

The State of Wisconsin has also required an apportionment of taxation on the sales revenue of a common carrier according to the amount of revenue attributable to its activities in Wisconsin.[35]

In *Northwestern Cement Co. v. Minnesota*[36] the United States Supreme Court held that net income from exclusively interstate operations of a foreign corporation may be subjected to state taxation, provided the levy is not discriminatory and is properly apportioned to local activities within the taxing state forming a sufficient nexus to support the same. There was no issue as to the reasonableness of the apportionment formula. The court said: "Nor will the argument that the exactions contravene the Due Process Clause bear scrutiny. The taxes imposed are levied only on that portion of the taxpayer's net income which arises from its activities within the taxing State."

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[35] *Moore Motor Freight Lines v. Department of Taxation* (1961), 14 Wis. 2d 377, 111 N.W. 2d 148.

[36] (1959), 358 U.S. 450, 464, 79 Sup. Ct. 357, 3 L. Ed.2d 421.

In *General Motors v. Washington*[37] General Motors challenged a state tax imposed on gross wholesale sales of motor vehicles, parts and accessories delivered in the state. In discussing earlier cases on gross receipts taxes the United States Supreme Court said:

"A careful analysis of the cases in this field teaches that the validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. Where as in the instant case, the taxing State is not the domiciliary State, we look to the taxpayer's business activities within the State, *i.e.*, the local incidents, to determine if the gross receipts from sales therein may be fairly related to those activities."

At another point in the case the court indicated that unapportioned gross receipts taxes are "suspect." However, the Supreme Court finally concluded that General Motors which had many dealers in Washington and warehouse facilities, etc., had so mingled its taxable business with that which was not taxable that it was permissible to attribute sales to local activities. The Court found a "maze of local connections."

And in *General Motors v. District of Columbia*[38] the Supreme Court was asked to review an administrative regulation implementing an income tax statute which was based on that portion of net income which is " 'fairly attributable to any trade or business carried on or engaged in within the District. . . . ' " The Court found that a regulation based on

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[37] (1964), 377 U.S. 436, 440, 441, 84 Sup. Ct. 1564, 12 L. Ed. 2d 430.

[38] (1965), 380 U.S. 533, 554, 85 Sup. Ct. 1156, 14 L. Ed. 2d 68.

a sales factor alone did not implement the statutory objective of apportionment. The Court made it clear, however, that if it had to reach the constitutional issue of due process the result would have been the same:

". . . We of course do not mean to take any position on the constitutionality of a state income tax based on the sales factor alone. For the present purpose, it is sufficient to note that the factors alluded to by this Court in justifying apportionment measures constitutionally challenged in the past lend little support to the use of an exclusively sales-oriented approach."[39]

The instate and out-of-state activities of a mail order insurer are sufficiently separable to require apportionment. With no place of business or agents within the state there would be no "maze of local connections" which justified a gross receipts tax in the *General Motors v. Washington Case.* William Patty in his article in *The Tax Lawyer*[40] had this to say:

". . . The premium tax is in effect a single factor apportionment formula based solely upon receipts. Although the receipts are the result of a chain of activities beginning in the domiciliary state and ending with the capture of the premium in the risk state, the principal activities are at home. There are located the insurer's only office, all of its tangible properties and all of its employees. There is undertaken all of the study and research that leads to the writing of the policies, their form and content. There all the mortality and accident studies of an actuarial nature are made, and in effect the 'manufacture' of the insurance conducted. There the investment of the premiums is made and the reserves are accumulated out of which benefits are paid. The risk state premium tax, therefore, in focusing only upon the receipt of the premium, would seem to ignore by far the bulk of the activity involved."

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[39] *Id.* at page 561.

[40] *Supra*, footnote 6, at page 380.

Those cases which have dealt with gross premium taxes have not validated such taxes on the issue of apportionment. In *Prudential Ins. Co. v. Benjamin*[41] a gross premium tax of three percent for the privilege of doing business within the state was validated against charges that it violated the commerce clause. The case established that the McCarran Act eliminated objection to state regulation and taxation of insurance based on the commerce clause. However; the issues of jurisdiction to tax, or necessity to apportion the tax under the due process clause were not in issue in *Benjamin*. In *Equitable Life Society v. Pennsylvania*[42] the court decided the narrow issue of whether a premium tax could be measured on both premiums received within the state and those sent to foreign insurance companies at their offices outside the state. The court found that this did not amount to taxing property beyond its jurisdiction. And in *Lincoln Life Ins. Co. v. Read*[43] the sole issue was whether the equal protection clause was violated by a higher gross premium tax on foreign insurance companies. The Court held that a more onerous tax on a foreign insurer was not a violation of the equal protection clause.

These Supreme Court cases have established the constitutionality of gross premium taxes (if apportioned) as against the contention that they are an unfair burden on interstate commerce. However, if not apportioned the tax may be, as here, unconstitutional, as a violation of the due process clause.

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[41] *Supra*, footnote 8.

[42] *Supra*, footnote 30.

[43] (1945), 325 U.S. 673, 65 Sup. Ct. 1220, 89 L. Ed. 1861.

Sec. 201.42 (11) (a), Stats., is clearly an unapportioned tax. *The statute provides for a three percent tax* on gross premiums; it does not provide for a tax on that portion of gross premiums attributable to activities within the state. Thus here it is not a question of approving or disapproving a particular apportionment formula. We cannot order an apportionment to save the constitutionality of the statute as it would amount to rewriting the statute.[44] Other Wisconsin tax statutes, most notably the income tax statutes, provide for apportionment of income directly in the statute.

By the Court. — Judgment reversed.

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[44] In *Greyhound Lines v. Mealey, supra,* footnote 34, the United States Supreme Court was able to remand the case for proper apportionment because it was agreed that as a matter of construction the statute permitted such apportionment.

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

ROBERT O. UEHLING
CLERK

Madison, *June 4, 1974*

To

Aberg, Bell, Blake & Metzner
Madison
John E. Armstrong,
Asst. Atty. Gen.

Sir: — The Court today announced decision in your case as follows:

AMENDED DECISION ON MOTION
FOR REHEARING

246 National Liberty Life Ins. Co. v. State

Motion for rehearing denied
WITHOUT COSTS.

Respectfully yours,
ROBERT O. UEHLING
Clerk of Supreme Court.